A

Brenda Wong v Yap Hee Tai

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-12BNCC-7–03 OF 2017
MOHD NAZLAN J
30 NOVEMBER 2017

C *Civil Procedure — Appeal — Record of appeal — Appellant failed to deliver requisite draft index of the documents — Whether appeal defective in absence of draft index — Whether appellant party to agreement — Whether appellant had power to sue in its own name — Whether I-Cloud should instead be the plaintiff in this suit — Rules of Court 2012 O 55 r 4(4)*

D

Contract — Recovery — Recovery of commission — Unjust enrichment — Payment made by appellant into bank account of respondent — Respondent asserted that account was handled by her husband and did not involve with E *dealings — Whether respondent unjustly enriched — Discharge of evidential burden — Whether evidential burden had been discharged by respondent — Whether there was evidence to attach liability on respondent — Evidence Act 1950 s 103 — Contracts Act 1950 s 71*

F The appellant appealed against the decision of the sessions court which had dismissed the claim filed by the appellant herein (the plaintiff in the sessions court below) for the recovery of a commission payment having earlier been made by the appellant to the respondent (the second defendant in the sessions court below). The respondent was the wife of the first defendant in the G proceedings before the sessions court. The first defendant represented to the appellant that he was an agent of Bayerex Capital Ltd ('Bayerex') that assisted the appellant to secure a loan of USD5m for the appellant's firm, I-Cloud Forest Incorporated ('I-Cloud'), from HSBC Bank in Canada. The appellant paid a commission amounting to USD150,000 being 3% of the intended loan H to Bayerex for its services and that the first defendant would return the said USD150,000 if the loan from HSBC Canada to I-Cloud did not materialise. The appellant made the payment into the bank account of the respondent, upon the direction of the first defendant. The appellant had also executed on behalf of I-Cloud, a loan agreement dated 24 November 2015 with Bayerex I and HSBC Canada. A letter issued by Bayerex, signed by an individual who was stated as its CEO, dated 25 November 2015, and addressed to the respondent and the first defendant, authorised both as agents to collect the said 3% and to later remit the sum to Bayerex. The first defendant subsequently delivered to the appellant a letter dated 30 November 2015 from HSBC in

Toronto purportedly confirming an account for I-Cloud had been opened, and that certain documents such as a cheque book and an ATM card would be sent to the appellant. However, as the documents from HSBC never arrived, the appellant did his own inquiries directly with HSBC on 14 December 2015 and discovered that HSBC Canada had neither opened any account nor approved any loan for I-Cloud. The appellant then wrote to the first defendant and the respondent, demanding the return of the USD150,000 but was ignored. The appellant subsequently, through his solicitors issued a demand notice to the same parties dated 28 January 2016 but also went unanswered. Hence the suit instituted by the appellant at the sessions court and subsequently this appeal. The respondent raised a preliminary objection that the appeal filed by the appellant was in breach of O 55 r 4(4) of the Rules of Court 2012 and was therefore defective, for his failure to deliver the requisite draft index of the documents to be included in the record of appeal. The issues for consideration were: (a) whether the appeal was defective in the absence of draft index; (b) whether I-Cloud should instead be the plaintiff in this suit; (c) whether there was evidence to attach liability on the respondent; and (d) whether there was unjust enrichment occasioned to the appellant.

Held, reversing decision of sessions court in respect of payment of refund of RM645,000 and allowing the appeal with costs:

(1) The appellant was not asked to explain the reason of the absence of the draft index and it would be unjust and inappropriate to allow the objection without hearing any explanation. Therefore, it was considered that the respondent did not wish to pursue the preliminary objection (see para 26).

(2) Since I-Cloud was the property of the appellant and the payment sought to be recovered was in fact paid by the appellant, it was well within his right for the appellant to have instituted the claim in his own name, being the person who claimed to have been aggrieved by a failed transaction to which he was a party. Thus, the action of the appellant, who claimed to have suffered the loss of the commission payment in a failed loan application, instituting a suit against the first defendant, being the very person whom the appellant interacted with, and the respondent, into whose bank account the payment of the sum of USD150,000 had been made, was entirely proper (see paras 29 & 33).

(3) Despite the absence of written undertaking from the respondent for the return of the commission, the respondent did not deny the authenticity of the authorisation allegedly granted by Bayerex to both the first defendant and the respondent. The respondent was not entirely a stranger in the transaction to the commission payment. This is because it was not disputed that the money had been deposited in the respondent's

bank account. Therefore, to avoid liability, the respondent must demonstrate that at least the money was no longer placed in her account (see paras 36 & 39).

(4) There was no evidence that the money had been paid to Bayerex. It would be insufficient for the respondent to simply deny knowledge or claim ignorance of the transaction by refusing to offer evidence to show that the money had been paid out of her account to the intended recipient. The respondent also did not offer any document to corroborate her version that the money had been utilised by the first defendant. The respondent's failure to respond to the demand letter further weakened her defence. In view of that, there was more than sufficient basis to find liability on a balance of probabilities against the respondent (see paras 40, 42, 44 & 51).

(5) Since there was no loan transaction with HSBC and also as the agreement was for the first defendant to make the refund should the loan not materialise, it is beyond dispute that the money must be returned to the appellant. Since no evidence was furnished to show that the money was withdrawn out of the respondent's account, she was accountable under the law to make the refund. The respondent was compelled to return the sum of RM645,000 to the appellant as it fell within the four conditions in the scope of s 71 of the Contracts Act 1950 (see paras 53 & 58).

(6) Appellate intervention was justified as the findings of the sessions court in respect of the key issues represented an insufficient judicial evaluation of the evidence as well as an erroneous application of the law which could not be sustained (see para 60).

[Bahasa Malaysia summary

Perayu merayu terhadap kepututsan mahkamah sesyen yang telah menolak tuntutan yang difailkan perayu untuk pemulihan pembayaran komisyen yang telah dibuat oleh perayu kepada responden (defendan kedua di mahkamah sesyen). Responden adalah isteri kepada defendan pertama dalam perbicaraan di mahkamah sesyen. Defendan pertama memberitahu kepada perayu bahawa beliau adalah ejen Bayerex Capital Ltd ('Bayerex') yang telah membantu perayu untuk memperoleh pinjaman sebanyak USD5 juta untuk firma perayu, I-Cloud Forest Incorporated ('I-Cloud'), dari Bank HSBC di Kanada. Perayu telah membayar komisyen berjumlah USD150,000 yang merupakan 3% daripada pinjaman yang dimaksudkan kepada Bayerex untuk perkhidmatannya dan defendan pertama akan mengembalikan USD150,000 tersebut jika pinjaman dari HSBC Kanada kepada I-Cloud tidak terjadi. Perayu telah membuat pembayaran ke dalam akaun bank responden, atas arahan defendan pertama. Perayu juga telah melaksanakan bagi pihak I-Cloud, satu perjanjian pinjaman bertarikh 24 November 2015 bersama Bayerex dan HSBC Kanada. Satu surat yang dikeluarkan Bayerex, yang ditandatangani oleh

seorang individu yang dinyatakan sebagai Ketua Pegawai Eksekutif mereka, bertarikh 25 November 2015, dan ditujukan kepada responden dan defendan pertama, memberi kuasa kedua-dua sebagai ejen untuk mengumpul 3% tersebut dan untuk seterusnya mengirimkan jumlah tersebut kepada Bayerex. Defendan pertama kemudiannya menghantar kepada perayu satu surat bertarikh 30 November 2015 daripada HSBC di Toronto mengatakan pengesahan satu akaun untuk I-Cloud telah dibuka, dan dokumen-dokumen tertentu seperti buku cek dan kad ATM akan dihantar kepada perayu. Walau bagaimanapun, memandangkan dokumen-dokumen daripada HSBC tidak pernah tiba, perayu membuat pertanyaan sendiri secara langsung dengan HSBC pada 14 Disember 2015 dan mendapati bahawa HSBC Kanada tidak pernah membuka sebarang akaun atau meluluskan sebarang pinjaman kepada I-Cloud. Perayu seterusnya menulis kepada defendan pertama dan reponden, menuntut pulangan USD150,000 tetapi tidak diendahkan. Perayu kemudiannya, melalui peguamnya mengeluarkan notis tuntutan kepapa pihak yang sama bertarikh 28 Januari 2016 tetapi juga tidak dijawab. Dengan itu, saman dimulakan oleh perayu di mahkamah sesyen dan seterusnya rayuan ini. Responden membangkitkan bantahan awal bahawa rayuan yang difailkan oleh perayu telah melanggar A 55 k 4(4) Kaedah-Kaedah Mahkamah 2012 dan oleh itu cacat, kerana kegagalannya menyerahkan draf indeks dokumen yang perlu dimasukkan didalam rekod rayuan. Isu-isu pertimbangan adalah: (a) sama ada rayuan cacat kerana ketiadaan draf indeks; (b) sama ada I-Cloud sepatutnya menjadi plaintif dalam saman ini; (c) sama ada terdapat bukti untuk menahan liabiliti terhadap responden; dan (d) sama ada terdapat pengkayaan tak patut yang berlaku terhadap perayu.

Diputuskan, membatalkan keputusan mahkamah sesyen berkenaan dengan bayaran balik RM645,000 dan membenarkan rayuan dengan kos:

(1) Perayu tidak diminta untuk menjelaskan sebab ketiadaan draf indeks dan adalah tidak adil dan tidak sesuai untuk membenarkan bantahan tanpa mendengar apa-apa penjelasan. Oleh itu, adalah dianggap bahawa responden tidak ingin meneruskan bantahan awal (lihat perenggan 26).

(2) Oleh kerana I-Cloud adalah hak milik perayu dan bayaran yang diminta untuk dipulihkan adalah sebenarnya dibayar oleh perayu, adalah hak untuk perayu untuk memulakan tuntutan atas nama beliau sendiri, sebagai orang yang mendakwa telah terkilan dengan transaksi yang gagal dimana beliau adalah salah satu pihak. Oleh itu, tindakan perayu, yang mendakwa telah mengalami kerugian pembayaran komisyen dalam permohonan pinjaman yang gagal, memulakan satu tuntutan terhadap defendan pertama, yang merupakan orang yang berinteraksi dengan perayu, dan responden, pemilik akaun bank dimana pembayaran berjumlah USD150,000 yang dibuat, adalah wajar (lihat perenggan 29 & 33).

(3) Walaupun ketiadaan akujanji bertulis daripada responden untuk pemulangan komisyen, responden tidak menafikan kesahihan kebenaran yang didakwa diberi oleh Bayerex kepada defendan pertama dan responden. Responden bukanlah seorang asing dalam transaksi pembayaran komisyen tersebut. Ini adalah kerana ianya tidak dipertikaikan bahawa wang tersebut telah dimasukkan ke dalam akaun bank responden. Oleh itu, untuk mengelakkan liabiliti, responden mesti menunjukkan bahawa sekurang-kurangnya wang tersebut tidak lagi berada dalam akaun beliau (lihat perenggan 36 & 39).

(4) Tiada bukti bahawa wang tersebut telah dibayar kepada Bayerex. Adalah tidak mencukupi untuk responden untuk menafikan pengetahuan atau menuntut kejahilan transaksi tersebut dengan menolak untuk menawarkan bukti untuk menunjukkan bahawa wang tersebut telah dibayar dari akaun beliau kepada penerima yang sepatutnya. Responden juga tidak menawarkan apa-apa dokumen untuk menyokong kenyataannya bahawa wang tersebut telah digunakan oleh defendan pertama. Kegagalan responden untuk menjawab surat tuntutan semakin melemahkan pembelaan beliau. Dengan itu, terdapat lebih dari cukup asas untuk menunjukkan liabiliti atas imbangan kebarangkalian terhadap responden (lihat perenggan 40, 42, 44 & 51).

(5) Oleh kerana tiada transaksi pinjaman bersama HSBC dan juga perjanjian bagi defendan pertama untuk melakukan pemulangan jika pinjaman tidak terjadi, tidak boleh dipertikaikan bahawa wang tersebut mesti dipulangkan kepada perayu. Memandangkan tiada bukti diberikan untuk menunjukkan wang tersebut dikeluarkan daripada akaun responden, beliau bertanggungjawab dibawah undang-undang untuk membuat bayaran balik. Responden perlu memulangkan jumlah RM645,000 kepada perayu kerana termasuk didalam empat syarat di bawah skop s 71 Akta Kontrak 1950 (lihat perenggan 53 & 58).

(6) Campur tangan rayuan dibenarkan kerana pendapat mahkamah sesyen berkenaan isu-isu utama melambangkan penilaian kehakiman yang tidak mencukupi terhadap bukti serta kesalahan aplikasi undang-undang yang tidak dapat diterima (lihat perenggan 60).]

Notes

For cases on record of appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1900–1903.

For cases on recovery in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6412–6415.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Bank Simpanan Nasional v Rudysham bin Abdul Raof [2016] MLJU 909; [2017] 4 CLJ 234, HC (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Letang v Cooper [1965] 1 QB 232, CA (refd)
Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor [1998] MLJU 382; [1999] 1 CLJ 601, HC (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57; [1986] 1 MLRA 520, SC (refd)
RNS Oil and Gas Sdn Bhd v Norhayati bt Ahmad Kamal [2016] MLJU 934; [2016] 6 AMR 668, HC (distd)
Rugber Kaur Ajaib Singh v Ho Shee Fun & Anor [2011] MLJU 1551; [2011] 1 MLRA 256, CA (refd)
Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt [2016] 5 MLJ 220; [2016] 9 CLJ 73, CA (refd)
Tanjung Teras Sdn Bhd v Kerajaan Malaysia [2015] MLJU 2161; [2015] 9 CLJ 1002, CA (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Contracts Act 1950 s 71
Courts of Judicature Act 1964 s 29
Evidence Act 1950 ss 17, 103
Rules of Court 2012 O 55 r 4(4)

KY Wong (Farid, Wong & Wee) for the appellant.
Saran Singh (Saran Singh & Co) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is an appeal against the decision of the sessions court which had dismissed the claim filed by the appellant herein (the plaintiff in the sessions court below) for the recovery of a commission payment having earlier been made by the appellant to the respondent (the second defendant in the proceedings before the sessions court).

[2] After having heard the appeal, I allowed the same, and stated the main grounds in support thereof. This judgment contains the full reasons for my decision.

A KEY BACKGROUND FACTS

[3] The parties are Malaysians. The respondent who was the second defendant in the trial, is the wife of the first defendant. The first defendant however is a bankrupt. The trial had thus been pursued by the appellant against the respondent only.

[4] The salient facts, in so far as they are relevant to this appeal, are not complex. It started when the first defendant represented to the appellant that the former was an agent of one Bayerex Capital Ltd ('Bayerex'), an entity which was purportedly operating in Canada and that through Bayerex, the first defendant could assist the appellant secure a loan of USD5m for the appellant's firm, I-Cloud Forest Incorporated, from HSBC Bank in Canada.

[5] It is common ground that this representation is contained in a written undertaking issued by the first defendant to the appellant by way of an email dated 27 November 2015. Based on other email communication, it is also not denied that the appellant was required to pay a commission amount of USD150,000, being 3% of the intended loan amount of USD5m, to Bayerex for its services, which the first defendant undertook to remit to Bayerex, and that the first defendant would return the said USD150,000 if the loan from HSBC Canada to I-Cloud Forest Incorporated ('I-Cloud') did not materialise.

[6] A letter issued by Bayerex, signed by an individual who was stated as its CEO, dated 25 November 2015, and addressed to the respondent and the first defendant, authorised both of them as agents to collect the said 3% and to later remit the sum to Bayerex.

[7] The appellant then made the payment of the USD150,000 into the bank account of the respondent, upon the direction of the first defendant. The crediting of the account of the respondent was not disputed but respondent asserted that the account was handled by her husband, the first defendant. The first defendant subsequently delivered to the appellant a letter dated 30 November 2015 from HSBC in Toronto purportedly confirming an account for I-Cloud had been opened, and that certain documents such as a cheque book and an ATM card would be sent to the appellant. The appellant had also executed on behalf of I-Cloud, a loan agreement dated 24 November 2015 with Bayerex and HSBC Canada.

[8] However, as the documents from HSBC never arrived, the appellant did his own inquiries directly with HSBC on 14 December 2015 and discovered that HSBC Canada had neither opened any account nor approved any loan for I-Cloud. The appellant then wrote to the first defendant and the respondent, demanding the return of the USD150,000. This went unheeded.

The appellant subsequently, through his solicitors issued a demand notice to the same parties dated 28 January 2016 for the same. This demand too went unanswered.

[9] Hence the suit instituted by the appellant at the sessions court in March 2016. The appellant also lodged a police report on 15 August 2016, claiming that that the first defendant had forged bank documents, and basically seeking assistance for the return of the commission.

ESSENCE OF THE DECISION OF THE SESSIONS COURT

[10] The appellant, as the plaintiff, was the only witness for the plaintiff. The plaintiff issued a subpoena against the first defendant, who appeared, but was not eventually called by the appellant. The defendants at the trial called only the respondent, the second defendant thereat as their sole witness.

[11] The trial judge, in dismissing the suit, made the primary finding that the respondent was not involved in the transaction and there was no agreement between her and the appellant that could be enforced by the latter. It was also held that there was no unjust enrichment against the respondent since the ingredients for its application under s 71 of the Contracts Act 1950 could not be established by the appellant.

[12] The sessions court had also stated in its grounds of judgment that the appellant had no right to pursue the claim since the contracting parties were I-Cloud and the first defendant, and not the appellant personally, more so as the loan was intended for I-Cloud.

PRINCIPAL CONTENTIONS OF PARTIES

[13] The thrust of the claim by the appellant as the plaintiff at trial and repeated in this appeal is that since the commission money was paid into the account of the respondent, she was responsible for its return to the appellant given the failure of the first defendant and Bayerex to secure the loan from HSBC Canada.

[14] The commission payment was also the property of the appellant, and not I-Cloud, even though the intended loan was meant for I-Cloud. Thus the appellant's action in pursuing the suit was proper.

[15] The appellant is therefore appealing on the principal ground that the sessions court had erred in law and/or fact, in having made the determination that no liability could attach on the respondent and that I-Cloud should be the proper party to institute the writ action.

[16] The respondent maintained the stance that there was no evidence that could attribute liability against her for she was not involved in the dealings between the appellant and the first defendant. She did not deny the sum of RM645,000 representing the equivalent of the commission of USD150,000 was indeed credited into her bank account, but insisted that it was managed by the first defendant and must have been utilised by her husband.

[17] It was also argued by the respondent that the wrong parties had instituted and been sued in the suit, for it ought to have been I-Cloud and Bayerex, respectively instead.

[18] In addition, the respondent additionally in her written submissions raised the preliminary objection that the appeal filed by the appellant is in breach of O 55 r 4(4) of the Rules of Court 2012 ('the RC 2012') and is therefore defective, for his failure to deliver the requisite draft index of the documents to be included in the record of appeal.

[19] Before I examine the relevant issues and the grounds of appeal however, I must remind myself of the law on appeals.

LAW ON APPELLATE INTERVENTION

[20] In hearing this appeal, I am reminded of the function of this court for that purpose as established by case law authorities and have therefore proceeded approaching the same accordingly. The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot be emphasised enough (see for instance, the decision of the Court of Appeal in the case of *Rugber Kaur Ajaib Singh v Ho Shee Fun & Anor* [2011] MLJU 1551; [2011] 1 MLRA 256).

[21] At the same time, I am also mindful of s 29 of the Courts of Judicature Act 1964 which provides for all civil appeals to be done by way of a rehearing, noting that the decision being appealed against in the instant case concerns one delivered after a full trial proceeding. Regardless, it is clear that any intervention should be a judiciously measured response by an appellate tribunal, on the established principal grounds such as a wrong application of the law or an insufficient judicial evaluation of the evidence (see for instance, the judgment of the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19).

EVALUATION AND FINDINGS OF THIS COURT

Preliminary Objection — Is the appeal defective in the absence of draft index?

[22] This is a matter that I should deal with first for completeness' sake. The respondent relied on my decision in *RNS Oil and Gas Sdn Bhd v Norhayati bt Ahmad Kamal* [2016] MLJU 934; [2016] 6 AMR 668 where I held that failure by an appellant to send a draft index in the absence of a satisfactory explanation is fatal. I said:

> [15] Clearly the use of the word 'shall' connotes the mandatory nature of the requirement. Failure by the appellant to adhere to the need to provide the solicitors to the respondent the draft index quite palpably deprive of the latter the right to object to the inclusion or exclusion of any document and may have the effect of undermining the integrity and credibility of the appeal record. Such non-compliance has been held to be fatal. In *Chuah Tim Lan v RHB Bank Bhd & Anor* [2008] 6 CLJ 500, on the issue of the need to provide draft index for an appeal to the Court of Appeal contained in a similar requirement found in r 18 (6) of the Rules of the Court of Appeal 1994, Suriyadi Halim Omar JCA (as he then was) held as follows:-
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> ...
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> [16] It is to be emphasised that the appellant did not offer any explanation for the failure other than to submit that it was curable and did not cause any prejudice to the respondent. It is observed that it has become fashionable for those in default to argue, as the appellant did in the instant case, that the non-compliance is a mere irregularity and all too conveniently call in aid of the ubiquitous O 1A and O 2 rr 1 and 3 of the RC 2012 which read as follows:
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> ...
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> [17] But O 1A and O 2 are not and cannot be the true answer to every transgression of the rules of court. The Court will not cure the failure to comply with requirements which are mandatory in nature such as those encapsulated in O 55 of the RC 2012. Where rules are mandatory, and explanation for the violations deemed unacceptable, considerations of lack of prejudice and absence of substantial miscarriage of justice to the respondent, whilst relevant, become secondary. When explanation for the non-compliance is not forthcoming or not acceptable, the infringement is more likely to have been intentional or at the minimum involve a reckless disregard for the rules of court, which the court will at any rate not countenance.
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> ...
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> [19] In my judgment, the failure by the appellant to strictly comply with the relevant requirements of O 55, particularly when no explanation for the non-compliance is forthcoming, constitutes a fundamental irregularity of a nature which is undeserving of attracting the application of the curative provisions of O 1A and O 2 of the RC 2012. They instead constitute a nullity and renders the appeal defective and incompetent. I therefore allow the preliminary objection of the

respondent in respect of the failure on the part of the appellant to provide the draft index.

[23] In the instant case, however, even though the objection was expressed in the written submissions of the respondent, and at the start of the hearing of the appeal, counsel for both parties indicated their reliance on the respective written submissions, counsel for the respondent did not raise the objection during oral submission where both counsel addressed the court on the issues they wished to draw the attention of the court to. The issue was not raised at the hearing at all and the appellant was thus not asked to explain the reason for not providing the draft index.

[24] Although I am not at all suggesting that every point of contention must additionally be orally raised at the hearing despite it already being stated in the written submission, in this case, the complaint which was in the nature of a preliminary objection was only briefly mentioned in a single short paragraph in the respondent's written submission, stating almost as a matter of fact that the appellant did not provide the draft index.

[25] There was absolutely no mention of any other background facts concerning the preparation of the appeal records by the appellant and any communication between the counsel for the parties in that respect. Neither was there any earlier direction by the court for the filing of reply submissions.

[26] In such a situation, like presently, I do not think it would be just and appropriate to allow the preliminary objection without hearing the respondent as to whether or not he had any explanation for the absence of providing the draft index, or even to consider whether it was true that he failed to send the same in the first place. Despite both counsel making oral submissions and replies to each other's arguments at the hearing before me, the matter of the draft index was never raised by the respondent at the start of the hearing as should have been the case for any preliminary objection, or at any time surfaced during the hearing of the appeal. I therefore consider that the respondent did not wish to pursue the preliminary objection and proceeded to hear the appeal without making a ruling on the objection.

Should I-Cloud instead be the plaintiff in the suit?

[27] It was submitted that the appellant had no standing to pursue the claim since the contracting parties were rightfully I-Cloud and the first defendant, and not the appellant personally, and that the loan was intended for I-Cloud.

[28] I do not find this argument tenable. It may well have been the case that the loan was intended to be for I-Cloud. I think it is common ground that

I-Cloud was a private entity owned and managed by the appellant. The respondent was not disputing this, even though no documents had been produced to show the true status and nature of I-Cloud, and the information of ownership and management. In his testimony, the appellant said that I-Cloud is a corporation incorporated in the British Virgin Island and wholly owned by him.

[29] But here we are only concerned with the recovery of the commission sum paid personally by the appellant into the account of the respondent. The payment was made from the personal account of the appellant. It was not from the account of I-Cloud. It was made by way of a cheque deposit, bearing his name in favour of the respondent (as evidenced at p 14 of the appeal record). I reiterate that it was not from the account of I-Cloud. It is true and admitted by the appellant that the payment of the said USD150,000 was indeed as part of the transaction to obtain a loan for I-Cloud. However since I-Cloud is the property of the appellant and much more relevantly, the payment sought to be recovered was in fact paid by the appellant, in my view, it is well within his right for the appellant to have instituted the claim in his own name, being the person who claimed to have been aggrieved by a failed transaction to which he was a party.

[30] For completeness, even though not raised, nor can the respondent argue that the claim should instead be made against Bayerex and not either of the first defendant or the respondent, since the payment was intended to be made to Bayerex and the first defendant and the respondent were merely the 'conduits'.

[31] This contention cannot succeed because the payment was actually made to the account of the respondent, not that of Bayerex. In fact, as stated earlier, a loan agreement was even purportedly executed between I-Cloud, HSBC Canada and Bayerex on 24 November 2015. This is another reason why an action against Bayerex is an exercise in futility. For, given the denial by HSBC that an account had been opened or the loan approved for I-Cloud, the representation to the contrary by the first defendant earlier seems very likely to have been false, more so when the appellant as stated earlier had also lodged a police report alleging the first defendant forged bank documents.

[32] It appears as clear as day that the appellant could have been cheated by a scam primarily perpetrated by the first defendant. The authenticity of the loan agreement itself is plainly in doubt and rightly classified as a Part C document at trial.

[33] Thus, the action of the appellant, who claimed to have suffered the loss of the commission payment in a failed loan application, instituting a suit against the first defendant, being the very person whom the appellant

A interacted with, and the respondent, into whose bank account the payment of the sum of USD150,000 had been made, was entirely proper. The appellant clearly has a cause of action against both the first defendant and the respondent for the repayment of the commission payment within the meaning of a cause of action, which concept had been described by a leading English case of *Letang v*
B *Cooper* [1965] 1 QB 232 to be referable to the factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

No evidence to attach liability on the respondent?

C

[34] This is the crux of the contention between the parties. This is also the heart of the appeal. The principal argument of the respondent as similarly found by the sessions court is that on the evidence, she was not involved in the transaction.

D

[35] It is worth reiterating that the main assertions by the respondent are that firstly she had absolutely no dealings with the appellant which is not denied by the appellant, other than her admission that the sum equivalent to the commission payment of RM645,000 had been credited into her account. And
E secondly however, the respondent maintained she had nothing to do with the same, as the money was handled by her husband, the first defendant, who, according to her testimony, managed her bank account.

F **[36]** I have difficulty trying to agree with this assertion, for a number of reasons. First, despite the absence of any written undertaking from the respondent for the return of the commission sum (unlike the undertaking by the first defendant), there is no specific denial by the respondent of the authenticity of the authorisation dated 25 November 2015 referred to earlier,
G allegedly granted by Bayerex to both the first defendant and the respondent, and this letter was in any event placed in the bundle of document in Part B. In *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601 Augustine Paul J held:

> H It is therefore clear that where a document is admitted with formal proof being dispensed with the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise. I must make it clear that the cross examination that I have just referred to is cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the
> I document has been dispensed with which means that he need not be made available for cross-examination. If he is required to be produced for cross-examination then the object of dispensing with formal proof of the document will be defeated. If cross-examination of the maker is required in order to establish the truth of the contents of the document then the party requiring such cross-examination ought not to have agreed to dispense with formal proof. Where he agrees to dispense with

formal proof the other party is not obliged to produce the maker for cross-examination. In that event the evidentiary value of the document is determined by cross-examination of other witnesses produced by either party or by calling other witnesses on the issue concerned and the circumstances of the case.

[37] It is true that in giving evidence, the respondent did claim that she was never appointed as an agent of Bayerex, and that she only first saw the letter at trial. But as her own witness, the denial was stated in her re-examination. The challenge against the contents of the said authorisation letter was not made during the cross-examination of the opponent's witness (the appellant). As the respondent sought to dispute its contents, produced by the appellant and agreed to be placed in Part B, she ought to have cross-examined the witness of the appellant's on the same. This was not done, based on my review of the notes of proceedings of the trial.

[38] The approach taken by the respondent is also not in keeping with the principle expressed in the leading decision of the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 where it was held as imperative that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination, and that a failure in this respect could be construed as an abandonment of the pleaded case. Further, if a party, in the absence of valid reasons, refrains from doing so, he may be barred from raising it in argument. In the instance case, the respondent did not put her case that she was not an agent of Bayerex to the witness of the other side.

[39] Secondly, I do not consider it correct that the respondent is entirely a stranger in the transaction on the commission payment. Because it is not disputed that the money in question had been deposited in the bank account of the respondent as requested by the first defendant, and the case of the appellant is for the respondent to return the money, in order to avoid liability, the respondent must demonstrate that that at least the money is no longer placed in her account.

[40] This evidential burden is firmly on the respondent but has not been discharged by her. And neither is there evidence that the money had been paid to Bayerex, which was claimed to have appointed the first defendant and the respondent as agents for the purported purpose of assisting the plaintiff's company getting a loan from a bank in Canada, to collect the aforesaid sum for Bayerex.

[41] The respondent didn't deny knowledge that the sum of money had been deposited. But she did not seek to return the money. She also did not deal with the demand letter from the respondent but asked her husband to attend to the

matter. I agree that most of this could, to give the respondent the benefit of doubt, be explained by the argument that the husband who is a bankrupt is merely getting his wife to permit use of her bank account. To that extent there may be insufficient evidence to impose liability on the second defendant.

[42] Nevertheless, in my assessment, the respondent simply cannot deny knowledge or claim ignorance of the transaction by refusing to offer the evidence to show that the money had been paid out of her account to the intended recipient. Or at least to show the money is no longer in the account. In response, the respondent merely said she did not know anything about the transaction and her bank account was managed by the first defendant. This in my view is plainly insufficient.

[43] First, there is some doubt as to whether it is true that her husband was operating her bank account. As highlighted by the appellant, there was some contradiction in her testimony during cross-examination. One would expect an account holder to manage his or her own account, in line with the standard bank regulation and the usual terms and conditions on use of account. In the notes of proceedings, the following exchanges are significant:

> Q : Miss Brenda, your bank account for this Maybank are you the only person operating the bank?
>
> A: I'm the only one.
>
> ...
>
> Q: Do you have knowledge whether your husband, in another words Miss Brenda that your husband taken the money the 645,000?
>
> A: What do you mean by taken. He handled the account.
>
> Q: He handled the account. That's mean he has taken the money because you said earlier that based on the last statement the money is not there anymore. So your husband has taken the money?
>
> A: Should have, yes.

[44] Secondly, this contention of the respondent given under oath, is not only bold, but also bald. It is entirely unsubstantiated. Despite the evidence that the money did find its way into her own account, she did not, crucially in my view, offer any document to at least corroborate her version that the sum of RM645,000 had been utilised by the first defendant. The version that the sum remained in her account cannot be dismissed. She could have easily dispel that by producing her own bank statement. She conveniently chose not to.

[45] The possibilities that it was still in her account, even implying she was indeed closely working, albeit behind the scene, with her husband in the

transaction with the appellant certainly are far from remote. In other words, despite the appellant having established that the commission sum had been credited into the respondent's account, the respondent has clearly failed to discharge the burden of showing that the sum had been debited from the account, as alleged by the respondent much less, if true, for what purpose.

[46] The is trite that under s 103 of the Evidence Act 1950, if a person requests that the court believes in the existence of a certain fact, the burden of proof of establishing that fact is firmly on that person. He who alleges must prove. In this regard, I should refer to the leading decision of the Court of Appeal in *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 which reaffirms the rule that 'he who asserts must prove', whereby Siti Norma Yaakob JCA (as she then was) instructively held as follows:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

[47] Thus, otherwise, if the respondent's contention is accepted, then a defendant could easily and with impunity orchestrate a situation to extricate himself from liability by simply denying any knowledge or involvement in the transaction in dispute without offering any supporting evidence to discharge the evidential burden. That would not be countenanced by the law and is inconsistent with the ends of justice. That situation, like presently, is precisely the reason for the necessity for a party to discharge an evidential burden.

[48] The respondent also did not deny receiving the letter of demand but explained that she had merely asked the first defendant to deal with it. This is not the kind of reaction to a threat of a legal suit if the respondent was truly not involved to deny liability. The courts have held that in commercial and business relationships, the failure of one party to deny a solicitor's demand by the opposing party would amount to an implied admission.

[49] In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283;

A [1995] 4 CLJ 155, Gopal Sri Ram JCA (as he then was) held instructively as follows:

> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
>
> In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479 at p 487:
>
> > In *Wiedemann v Walpole* [1891] 2 QB 534 at p 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.
> >
> > Lord Esher MR, in his judgment, remarked,
> >
> > Here, we have only to see whether *the mere fact* of not answering the letters, *with nothing else* for us to consider is any evidence in corroboration of the promise. (Emphasis added).
>
> Earlier, in his judgment, he said, '*Now there are cases — business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*'. (Emphasis added.)

[50] More recently, in the Court of Appeal case of *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* [2016] 5 MLJ 220; [2016] 9 CLJ 73, Hamid Sultan Abu Backer JCA stated thus:

> (a) In the instant case, it was not in dispute that the respondent did not respond to the demand notice of the plaintiff and the defence alleging that he was not liable was only raised in the statement of defence. Evidently, failing to respond to the plaintiff's letter of demand, that too when the defence case was related to forgery, as well as the fact that the respondent did not lodge a police report upon receiving the demand, weakened the probative force of the defence case. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, the Court of Appeal went to the extreme end to say that failure to respond on the facts of the case should lead to entering of judgment ...
>
> (b) In abundance of caution we must say that failure to respond must not be equated to admission of the claim under s 17 of the Evidence Act 1950 ('the EA 1950'). Failure to respond will relate to conduct under s 8 of the EA 1950. Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or defendant's case. It is well-settled that not all demand notices must be responded. In *Wiedmann v Walpole* [1891] 2 QB 534, in

an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

(c) It must also be noted that in commercial cases (not civil), courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree (see *PECD Construction Sdn Bhd v Freehold Point Sdn Bhd* [2008] MLJU 127; [2008] 3 CLJ 215).

...

[51] There is nothing in the appeal record, either in the pleadings or the notes of proceedings or in any of the documents produced at trial which touches on the issue of the occupation or background of the respondent. Despite the appellant having proven that the sum of money was credited into her account, she never suggested that she was not conversant with matters of business when alleging that her account was operated by her husband, the first defendant. Thus, her failure to respond to the demand further weakens her defence. Accordingly, there was more than sufficient basis to find liability on a balance of probabilities against the respondent. The non-calling of the first defendant by the appellant as a witness did nothing to impair the appellant's case which in any event was supported by documents which parties had agreed to be placed in Part B.

Unjust enrichment

[52] In addition, and quite separate from the grounds discussed in the preceding paragraphs, the one other basis that operates to demolish the defence of the respondent is that the stance of the respondent would translate into what would otherwise be unjust enrichment on the part of the respondent. This is because the sum of RM645,000 is not in any event the property of either the first defendant and what more the respondent (who denied having anything to do with the money) given that it was clear that the underlying transaction on the opening of the account or approval of the loan for I-Cloud plainly did not happen, if not an outright deception in the first place.

[53] As discussed earlier, it is incontrovertible that the sum was credited from the personal account of the appellant. Since there was no loan transaction with HSBC and also as the agreement was for the first defendant to make the refund should the loan not materialise, it is beyond dispute that the money must be returned to the appellant. Since, as discussed above, no evidence was furnished by the respondent to show that the money has been withdrawn out of her

account, it necessarily follows, as the logic of the law and fairness would dictate, that she is also accountable under the law to make the refund.

[54] Section 71 of the Contracts Act 1950 would thus in this regard, apply. It reads as follows:

> 71 Obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[55] It is to be noted that in the Court of Appeal decision of *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002, Lim Yee Lan JCA reiterated the basis of s 71 as follows:

> Juristic basis behind s 71
>
> [31] Section 71 is the statutory embodiment of the common law principle of quantum meruit, which provides for a just compensation as the measure of the work done as opposed to contractual damages (see: *Siow Wong Fatt*, *Craven-Ellis v Cannons Ltd* [1936] 2 KB 403, *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 MLJ 14; [2013] 1 LNS 729).
>
> [32] Liability under s 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party (see: *Ramkrishna Shankarrao v Rangoobai and anr* AIR [1959] Bom 519; (1958) 60 BOMLR 459, *Abu Mohammed v Mohammed Kunju Lebba* (1995) DMC 316 and *Pallonjee Eduljee and Sons v the Lonavala City Municipality AIR* [1937] Bom 417; (1937) 39 BOMLR 835).

[56] And it cannot be overlooked that the Supreme Court had already earlier in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57; [1986] 1 MLRA 520 in the judgment of Lee Hun Hoe CJ (Borneo) held:

> We do not consider it necessary to deal with the various authorities cited but would refer only to *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118. There the Privy Council held, inter alia, that four conditions must be satisfied to establish a claim under s 71 of the Contracts (Malay States) Ordinance 1950. The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful;
>
> (2) must be done for another person;
>
> (3) must not be intended to be done gratuitously; and

(4) must be such that the other person enjoys the benefit of the act or the delivery.

[57] The crediting of the account of the respondent by the appellant for the reasons stated earlier would readily fall within the aforesaid four conditions, and thus the scope of s 71, compelling the return of the sum of RM645,000 by the respondent to the appellant.

[58] Otherwise, in this case, a clear injustice would be occasioned to the appellant, for a wrongdoer would instead be allowed to benefit from his own default, and offends the notion of fairness and justice.

[59] In the case of *Bank Simpanan Nasional v Rudysham bin Abdul Raof* [2016] MLJU 909; [2017] 4 CLJ 234, I had stated thus:

> No benefit from own default
>
> [88] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1).

CONCLUSION

[60] For the reasons that I have discussed in the foregoing, I find that on the evidence, the appellant had suceeded on a balance of probablilities, in establishing liability on the part of the respondent to require that the respondent refund the sum of RM645,000 credited by the appellant into her account. Alternatively a refund of the same under s 71 of the Contracts Act 1950 has also been established. The findings of the sessions court in respect of these key issues however represented an insufficient judicial evaluation of the evidence, as well an erroneous application of the law, which cannot be sustained, justifying appellate intervention. The appellant's other claim of damages for USD25,000 is however dismissed for the absence of evidence. Accordingly, I reverse the decision of the sessions court in respect of the payment of refund of RM645,000 and allow this appeal, with costs.

Decision of sessions court in respect of payment of refund of RM645,000 reversed; appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh